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Fraud Under the Immigration and Nationality Act

Mark A. Mancini*

The most often used and least understood words in immigration law are undoubtedly "fraud" and "willful misrepresentation." This article explores the statutory definitions of fraud and willful misrepresentation, and begins to explain what constitutes fraud and, perhaps more importantly, what does not.

I. Statutory Provisions

The basis for this discussion is section 212(a)(19) of the Immigration and Nationality Act of 1952 (INA),¹ which excludes from the United States "[a]ny alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact." Although this section was new in the 1952 Act, it constituted a statutory recognition of a judicial development. Previously, courts had held aliens who had obtained visas by fraud or willful misrepresentation excludable under several theories. For example, a person who committed such an act was excludable because his misrepresentation "defeated inspection,"² or because a visa procured by fraud "is no visa."³ As the State Department notes, however, in enacting section 212(a)(19), Congress was particularly aiming to deter fraudulent entry:

The inclusion of this provision expresses the concern with which Congress viewed cases of aliens resorting to fraud or willful misrepresentations for the purpose of obtaining visas or otherwise effecting unauthorized entry into the United States. The section is intended to prevent aliens from attempting to secure entry into this country by making false statements and then, when the falsity is discovered, trying out their eligibility as if nothing had happened.⁴

Congress's concern must indeed have been great, for the prescribed penalty is harsh. As the Board of Immigration Appeals pointed out in *In re G-G*,⁵ "[t]he violator is permanently barred from entry. Once he comes within the confines of this section, he may not thereafter, except in limited cases, legally enter the United States." The Board elaborated in *In re S- and B- C-*:⁶

Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States.⁷

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1 8 U.S.C. § 1182(a)(19) (1976).

2 United States *ex rel.* Volpe v. Smith, 62 F.2d 808, 811 (7th Cir. 1933).

3 Ablett v. Brownell, 240 F.2d 625, 629 (D.C. Cir. 1957).

4 U.S. DEP'T. OF STATE, 9 FOREIGN AFFAIRS MANUAL 413 n.2.1 [hereinafter cited as F.A.M.].

5 7 I. & N. Dec. 161, 165 (1956) (emphasis in original).

6 9 I. & N. Dec. 436 (1960).

7 *Id.* at 446, quoting REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, Jan. 1, 1953, p. 177.

Exclusion is a drastic and severe punishment for what may have been only a single lapse of judgment in an otherwise unblemished life. Recognizing the consequences, courts and the Board have been careful to circumscribe the section's effect as closely as possible, and have resorted increasingly to the ancient equitable rules imposing a rigorous standard for proof of fraud.

By its terms section 212(a)(19) treats two different classes of aliens. The first class, those who seek to procure, have sought to procure, or have procured visas or other documentation by fraud or willful misrepresentation, are permanently barred from any later entry to the United States, "except in limited cases." The section's second clause affects those who seek to enter the United States by fraud or willful misrepresentation. About this group, the State Department comments:

Since the language of the second clause of Section 212(a)(19) is cast in the present tense only, an alien seeking to enter the United States by means of a fraud or willful misrepresentation not covered by the first clause is ineligible only at the time of the attempted entry and does not become permanently ineligible for a visa in the future.⁸

The second class, however, must be small since its membership is limited to persons who make false claims to United States citizenship, certain Canadians who are exempt from the visa requirement, and—in rare cases—those who obtained a visa properly but who committed some fraud in the inspection process after arriving in the United States. The vast majority of cases are brought under the first clause.

Although section 212(a)(19) is the most obvious charge in a proceeding where fraud forms the basis of the offense, various cases have held that it is not exclusive. Two other possible provisions in section 212 could cover such an occurrence. Section 212(a)(14) excludes:

Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed⁹

Section 212(a)(20)¹⁰ also excludes "any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa . . . or other valid entry document required by this chapter"

In cases involving both these sections the Board of Immigration Appeals and the courts have recognized that a labor certification¹¹ obtained by fraud is no labor certification, and that a visa obtained by fraud is no visa.¹² This practice appears somewhat unsound, since Congress more likely intended to place *all* fraud cases in section 212(a)(19) after its enactment in 1952, rather than establish a series of overlapping and confusing excludability provisions.

⁸ 9 F.A.M. 413 n.1.3.

⁹ INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976).

¹⁰ INA § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1976).

¹¹ A labor certification is actually a piece of paper, like a visa. *See generally* 20 C.F.R. §§ 656.1-656.60 (1979).

¹² *Ablett v. Brownell*, 240 F.2d 625 (D.C. Cir. 1957).

Regarding visas procured by fraud, the better rule is that stated in *In re Martinez-Lopez*.¹³

It has been consistently recognized, however, that the type of misrepresentation which invalidates a visa is substantially identical with that which renders the alien excludable under section 212(a)(19) This rule appears to be correct and in accord with the general proposition that a representation invalidates a visa only if it is material or amounts to a fraud.¹⁴

Earlier in *Martinez-Lopez*, the Attorney General remarked that the section 212(a)(20) charge is best used where the visa was issued without specific authority or by an improper source rather than obtained by concealment or misrepresentation.¹⁵

Where fraud in obtaining a labor certification or a proper exemption from the certification requirement is at issue, violations of section 212(a)(14) are routinely charged.¹⁶ This is so even though the Labor Department rules governing labor certification invalidity because of fraud or willful misrepresentation are virtually the same as the Immigration and Naturalization Service and State Department rules governing visa invalidity for the same reasons.¹⁷

The use of section 212(a)(14) and (20) charges for fraud when section 212(a)(19) is more appropriate persists, because certain remedial provisions of the Act are unavailable to one found deportable under section 212(a)(19). The courts have properly frowned on such prosecutorial tactics;¹⁸ in the future fraud should be charged when fraud is suspected.¹⁹

The question of fraud can arise in several different ways. As noted above, the fraud may involve material misrepresentations of qualifications in a labor certification. Likewise, the fraud may involve falsification of evidence presented to a consular officer in an attempt to obtain a visa. Very commonly, the fraud may involve the *bona fides* of a marriage. INA section 241(c) controls in this last case:

An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of [Section 212(a)] . . . (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years

13 10 I. & N. Dec. 409 (1964).

14 *Id.* at 424.

15 *Id.* at 414. Compare, however, a parallel and apparently living line of contradictory cases by the BIA, holding that section 212(a)(20) is a proper charge even when fraud and material misrepresentation are at issue. *In re Vivas*, 16 I. & N. Dec. 68 (1977); *In re F-M-*, 7 I. & N. Dec. 420 (1957). No attempt has been made to reconcile these with the Attorney General's opinion in *In re Martinez-Gonzales*, 16 I. & N. Dec. 564 (1978).

16 See, e.g., *In re Gonzales*, 16 I. & N. Dec. 564 (1978).

17 20 C.F.R. § 656.30(d)(1979). See *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974); *Castaneda-Gonzales v. INS*, 564 F.2d 417 (D.C. Cir. 1977).

18 *Persaud v. INS*, 537 F.2d 776 (3d Cir. 1976); *Cacho v. INS*, 547 F.2d 1057 (9th Cir. 1976); See *In re Da Lomba*, 16 I. & N. Dec. 616 (1978).

19 As of this writing, relief under section 241(f) of the Act, one of the most common waivers of deportability, remains unavailable to one charged under section 212(a)(14), *In re Gonzales*, 16 I. & N. Dec. 564 (1978), but not to one charged under section 212(a)(20). *In re Da Lomba*, 16 I. & N. Dec. 616 (1978).

Note, however, the pending appeal filed in the Ninth Circuit in *Ying Suet Chow v. INS*, No. 80-7010 (9th Cir. Mar. 27, 1980), which argues forcefully that relief should be extended to charges of section 212(a)(14) where the basis of the accusation is *au fond* a species of fraud.

For a more thorough discussion of the nexus between sections 212(a)(14) and (20), see Mancini, *Excludability for Lack of a Valid Labor Certificate as a Species of Fraud*, 2 IMMIGRATION & NATIONALITY L. REV. 387 (1979).

prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws²⁰

Early in the history of this provision,²¹ it was decided that after the government had established a *prima facie* section 241(c) case, the respondent had the burden of showing that his marriage to a citizen was not contracted for the purpose of evading the immigration laws. Ordinarily the burden of proof in deportation cases is on the government,²² but under section 241(c) the burden shifts to the alien after the presentation of a *prima facie* case.

Section 241(c) is the Act's only provision under which the burden of proof in a fraud case can shift to the alien.²³ Absent a termination of a marriage within the statutory period, the burden remains on the government. Beyond the usual burden the government bears in all deportation cases, an allegation of fraud requires special caution in proof and is a more difficult burden to meet than in other cases.²⁴

Proof in deportation cases must be "clear, unequivocal and convincing."²⁵ Beyond this, the cases establish a much higher standard for proving civil fraud, variously stated as clear or irrefragable;²⁶ clear, precise and indubitable;²⁷ clear, distinct and certain;²⁸ or clearly and fully established.²⁹ Fraud can never be founded upon doubtful, vague, uncertain or inconclusive evidence³⁰ or upon mere suspicion.³¹ The Board of Immigration Appeals has acknowledged the place of the common law of fraud in immigration law by citing with approval common law fraud cases to bolster its decisions. In *In re Kwon*,³² the Board relied on *Canada Life Assurance Co. v. Houston*,³³ which held that "[t]he presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime." The Board also relied on *Tucker v. Traylor Engineering Manufacturing Co.*,³⁴ which stated that "[i]f the circumstances are as consistent with honesty

20 INA § 241, 8 U.S.C. § 1251(c) (1976).

21 *In re T-*, 7 I. & N. Dec. 417 (1957).

22 *Woodby v. INS*, 385 U.S. 276 (1966).

23 *Small v. INS*, 438 F.2d 1125 (2d Cir.), *cert. denied*, 402 U.S. 950, *rehearing denied*, 403 U.S. 912 (1971); *In re V-*, 7 I. & N. Dec. 460 (1957).

24 See, e.g., *United States v. Colorado Anthracite Co.*, 225 U.S. 219 (1912); *Farrar v. Churchill*, 135 U.S. 609 (1890); *Bamberger v. Schoolfield*, 160 U.S. 149 (1895).

There is also a rule stated in *In re S-* and *B-C-*, 9 I. & N. Dec. 436, 449 (1960), that describes a shift in the burden of proof in cases where an alien has made a misrepresentation and later wishes to prove it was immaterial:

On this aspect of the question the alien bears the burden of persuasion and proof. Having made a willful misrepresentation which tends to cut off a relevant line of investigation, he cannot now try out his ineligibility as if nothing had happened. . . . [He] bears the burden of establishing the true facts and the risk that any uncertainties resulting from his own obstruction of the inquiry may be resolved against him.

25 *Woodby v. INS*, 385 U.S. 276, 277 (1966).

26 *Farnsworth v. Duffner*, 142 U.S. 43 (1891); *Farrar v. Churchill*, 135 U.S. 609, 615 (1890).

27 *American Nat'l Bank v. Supplee*, 115 Fed. 657, 662 (3d Cir. 1902).

28 *Hulton v. Davis*, 108 Fed. 138, 151 (9th Cir. 1901).

29 *Chandler v. Pomeroy*, 143 U.S. 318, 337 (1892).

30 *Hoffman v. Overby*, 137 U.S. 465, 472-73 (1890).

31 *United States v. Hancock*, 133 U.S. 193, 197 (1890).

32 A20 972 326 (BIA, Nov. 3, 1977, unreported).

33 241 F.2d 523, 538 (9th Cir. 1957) (citation omitted).

34 48 F.2d 783 (10th Cir. 1931).

as with dishonesty, the inference of honesty must be drawn."³⁵

II. Elements of Fraud

The essential elements of fraud or willful misrepresentation at common law are nearly identical to those required in immigration matters. In *United States v. Hangar One, Inc.*,³⁶ a nonimmigration case, the district court restated the essential elements of intentional fraud as follows: (1) a false representation (2) regarding a material fact (3) by one who did not believe it to be true (4) with intent that it should be acted upon (5) by one who believed it to be true and (6) was misled by it (7) to his or her principal's injury.³⁷ The leading immigration case on the subject, *In re G-G*,³⁸ defines fraud as "false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party. The misrepresentation must be believed and acted upon by the party deceived to his disadvantage."³⁹ The cases cited in support of this definition are all common law fraud cases,⁴⁰ and the Board remarked that it defined fraud "in the commonly accepted legal sense."⁴¹ The definition is virtually identical to the *Hangar One, Inc.* definition and exemplifies the well-established consensus on the elements of fraud.

The difference between "fraud" and "willful misrepresentation" is also set forth in *In re G-G*:

Since the penalty is the same for actions accomplished by either fraud or willful misrepresentation, we believe the use of the word 'fraud' and use of the term 'willful misrepresentation' present two alternatives that are not substantially dissimilar. Therefore, the phrase concerning willful misrepresentation should be read as requiring the misrepresentation to be of the same quality as does fraud. This result can be readily reached if it is required that the misrepresentation be made with knowledge of its falsity and with actual intent to deceive so that an advantage under the immigration laws might be gained to which the alien would not have otherwise been entitled. In this way, the misrepresentation would be differentiated from an act committed in fraud only in that proof would not be necessary that the person to whom the misrepresentation was made was motivated to action because of the misrepresentation. . . .⁴²

Fraud, then, differs from misrepresentation only in that proof of reliance is unnecessary. As reliance is virtually assured in immigration cases (no visa or other documentation is ever issued without the applicant's filing an application, petition, etc.), there is no difference at all for immigration purposes.⁴³

³⁵ *Id.* at 786.

³⁶ 406 F. Supp. 60 (N.D. Ala. 1975).

³⁷ *Id.* at 70.

³⁸ 7 I. & N. Dec. 161 (1956).

³⁹ *Id.* at 165.

⁴⁰ *Pacific Royalty Co. v. Williams*, 227 F.2d 49 (10th Cir. 1955); *Davis v. Comm'r of Internal Revenue*, 184 F.2d 86 (10th Cir. 1950); *Hayman v. United States*, 51 F.2d 800 (E.D. Tex. 1931); *Imperial Assur. Co. v. Joseph Supornick and Son*, 184 F.2d 930 (8th Cir. 1950).

⁴¹ 7 I. & N. Dec. at 164.

⁴² *Id.*

⁴³ 9 F.A.M. 414 n.3.1 is in accord:

The fact that Congress used the terms 'fraud' and 'willfully misrepresenting a material fact' in the alternative indicates an intent to set a lower standard than is required in making a finding of what is known in the law as fraud. Nearly all cases brought under Section 212(a)(19) are cases of willful misrepresentation.

Presumably, this means that reliance need not generally be proved in cases brought under section

The first element in a fraud is obvious: a misrepresentation must be made. The State Department defines "misrepresentation" under section 212(a)(19) as "an assertion or manifestation not in accordance with the facts."⁴⁴ The Foreign Affairs Manual states further that mere silence can never constitute a misrepresentation,⁴⁵ that a "timely retraction" can purge a misrepresentation, if made at the first opportunity and in the course of the same proceedings,⁴⁶ and that behavior in the United States inconsistent with representations made in an application for a nonimmigrant visa does not necessarily connote fraud. Significantly, the Manual notes that misrepresentation does require guilty knowledge: "The fact that an alien pursues a visa application through an attorney or travel agent does not serve to insulate the alien from liability for misrepresentations made by such agents if it is established that he was aware of the action being taken in furtherance of his application."⁴⁷

The second element in a fraud is willfulness. The State Department defines "willfully" as "knowingly and intentionally, as distinguished from accidentally, inadvertently or in an honest belief that the true facts are otherwise . . . [I]t must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally and deliberately made an untrue statement."⁴⁸

Using the definition of fraud in *In re G-G*, willfulness consists of "knowledge of falsity with intent to deceive the other party." The courts agree with this interpretation. The leading case of *Castaneda-Gonzalez v. INS*⁴⁹ held that willfulness must be proven. The court ruled on this point because of the Board holding in the unusual case of *In re Kai Hing Hui*.⁵⁰

The immigration judge concluded that intent to deceive was a necessary prerequisite to a finding of deportability under 212(a)(19). He asserted that the Attorney General in *Matter of S- and B- C-*, *supra*, overruled our decision in *Matter of G-G*. We do not agree. The information furnished by the respondent to the Service regarding his identity was not true. The issue of intent with which the respondent gave those untrue answers is no longer governing. We interpret the Attorney General's decision in *Matter of S- and B- C-* as one which modified *Matter of G-G* so that the intent to deceive is no longer required before the willful misrepresentation charge comes into play.⁵¹

It is difficult to understand how *In re S- and B- C-*⁵² can be interpreted as somehow reading out the "willful" in "fraud or willful misrepresentation," especially when the question was never raised in that case. As the court stated, "There is no doubt that the misrepresentations were willful, in the sense that they were deliberately made with knowledge of their falsity."⁵³

212(a)(19). The cases tend to support this view, as none have ever been decided solely on the question of reliance.

44 9 F.A.M. 414 n.4.1.

45 *Id.* n.4.2.

46 *Id.* n.4.6.

47 *Id.* n.4.5.

48 *Id.* at 415 n.5.1.

49 564 F.2d 417 (D.C. Cir. 1977).

50 15 I. & N. Dec. 288 (1975).

51 *Id.* at 289-90 (citations omitted).

52 9 I. & N. Dec. 436 (1960).

53 *Id.* at 445.

Hui has never been cited in any later Board decision, and its inconsistency with the statutory language makes it an unlikely illuminator of congressional intent regarding fraud. The *Castaneda-Gonzalez* court makes short shrift of *Hui* by defining "willfulness" in the same way as *In re G-G*:

The government may not have to prove an intent to deceive in order to establish Castaneda-Gonzales' deportability under subsection 212(a)(19), but it must at least show that he knowingly and intentionally supplied the Labor Department with incorrect material facts when applying for his labor certification.⁵⁴

The last element in a fraud, materiality, is the most complicated and confusing both at common law and in immigration law. This element may also be the most elusive, by the very terms of its three-prong definition set forth in *In re S- and B- C-*:⁵⁵ (1) Does the record establish that the alien is excludable on the true facts?⁵⁶ (2) Did the misrepresentation tend to shut off a line of inquiry relevant to the alien's eligibility? (3) Might that injury have resulted in a proper determination that the alien be excluded?⁵⁷

In *Chaunt v. United States*,⁵⁸ the Supreme Court phrased this test slightly "differently"⁵⁹ in deciding the related question of whether naturalization should be revoked when procured "by concealment of a material fact or by willful misrepresentation" under INA section 340(a).

The government had "failed to show by 'clear, unequivocal, and convincing evidence' either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."⁶⁰

The first prong of the *Chaunt* test, called the "objective" prong by the State Department,⁶¹ is obviously easier to administer than the second. The objective prong simply reiterates the old common law rule of materiality set forth in *In re G-M*:⁶² "The courts have consistently held that a misrepresentation is not material, when made during proceedings for admission into the United States, if the alien would not have been denied a visa or excluded had he told the truth." The Board will try to put itself in the consul's position at the time the application was made.⁶³

⁵⁴ 564 F.2d 417, 434 (D.C. Cir. 1977) (citation omitted).

⁵⁵ 9 I. & N. Dec. 436, 447 (1960).

⁵⁶ It should be noted that prior to *In re S and B C*, misrepresentations as to *identity* were always considered material. See *In re P-F*, 6 I. & N. Dec. 164 (1954); *In re B- and P-*, 2 I. & N. Dec. 638 (1947). The board hearkens back to *Ablett v. Brownell*, 240 F.2d 625 (1957) when it states in a footnote in *S and B C* that where a visa is issued in the name of another "a question may be presented as to whether the alien satisfies the requirement of section 212(a)(20) that he possess a 'valid' visa or other document." 9 I. & N. Dec. at 448.

⁵⁷ See *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974). There the court used the test of *Chaunt v. United States*, 364 U.S. 350 (1960), to declare the immateriality of a misrepresentation on a labor certification, and noted, "Although *Chaunt* . . . involved denaturalization proceedings, their rationale is forceful here, where the severe remedy of deportation is the issue." 492 F.2d at 1299.

La Madrid-Peraza could just as easily have been decided under the rule in *S and B C*, and it is probably true that the two tests are essentially the same.

⁵⁸ 364 U.S. 350 (1960).

⁵⁹ *Id.* at 355.

⁶⁰ *Id.*

⁶¹ 9 F.A.M. 415 n.6.1.

⁶² 7 I. & N. Dec. 40, 74 (1956).

⁶³ *In re Avalos-Zavala*, 11 I. & N. Dec. 196 (1965).

The second prong of the *Chaunt* test is more troublesome. As one scholar recently commented, "the second of the *Chaunt* alternative tests of materiality . . . has caused difficulty in application by both the courts and the administrative agencies. Where the suppressed facts would not of themselves have precluded eligibility, how far must the government go in proving what would have happened had the true facts been known?"⁶⁴

The Foreign Affairs Manual reduces the question to "The Rule of Probability":

(1) The misrepresentation must be of such a nature as to be reasonably expected to foreclose certain information from the consular officer's knowledge.

(2) The information foreclosed by the misrepresentation must have been of basic significance to the alien's eligibility for a visa. In other words, the information concealed must be balanced against all the other information of record, and must be found to have been controlling or crucial to a final decision, and

(3) The truth of the matter must lead to a proper finding of ineligibility.⁶⁵

The Manual wisely requires all cases involving the Rule of Probability to be submitted to the Visa Office for an advisory opinion. This is especially prudent since the courts of appeal conflict somewhat in interpreting the Rule of Probability.

In *Kassab v. INS*,⁶⁶ the Sixth Circuit held that it was unnecessary that the "petitioner *would not* have procured his visa if the true facts had been known. It is sufficient that if the fact of the annulment proceeding had been revealed, it *might* have led to further action and the discovery of facts which would have justified the refusal of the visa."⁶⁷ In *Vasquez-Mondragon v. INS*,⁶⁸ the Fifth Circuit agreed that further inquiry need not have led to proper refusal of a visa, contrary to the State Department view in *In re S- and B- C-*,⁶⁹ where the Board ruled that the test was whether a *proper* refusal could have been made.

This more liberal interpretation was espoused by the District of Columbia Circuit in *Castaneda-Gonzalez*, and by the district court in *In re Field's Petition*.⁷⁰ Although this interpretation appears closer to the language and intent of both *In re S- and B- C-*, and *Chaunt*, the point unfortunately is still undecided, since the Supreme Court has declined to rule on the issue.

The recent case of *Fedorenko v. United States*⁷¹ concerned a Ukrainian native who in 1949 applied for a visa to enter the United States under the Displaced Persons Act of 1948.⁷² Fedorenko claimed on his application that he had been born in Poland, not the Ukraine, and that he was a farmer and factory worker from 1937 to 1945. In fact, he was a prison guard at the Treblinka concentration camp in 1942 and 1943. In 1970 he was naturalized, again making the same misrepresentations he had made on his visa application.

In 1977, denaturalization proceedings were begun under INA section 340(a)

64 M. Roberts, 58 INTERPRETER RELEASES 37 (1981). The author is indebted to Mr. Roberts for much of this discussion of materiality.

65 9 F.A.M. 415-418 n.6.31-6.34.

66 364 F.2d 806 (6th Cir. 1966).

67 *Id.* at 807.

68 560 F.2d 1225 (5th Cir. 1977).

69 9 I. & N. Dec. 436 (1960).

70 159 F. Supp. 144, 147 (S.D.N.Y. 1958). *But see* *United States v. Oddo*, 314 F.2d 115 (2d Cir. 1963).

71 101 S. Ct. 737 (1981).

72 50 U.S.C.A. §§ 1951-65 (West Supp. 1951).

on the ground that Fedorenko had procured his naturalization by willfully misrepresenting a material fact. A vice-consul who had administered the Act after the war testified that had the truth been told, there would have been an investigation and had Fedorenko's armed guard position become known, his application would have been denied. Fedorenko conceded the misrepresentation but claimed his service at Treblinka was involuntary. The district court found for Fedorenko,⁷³ construing the second alternative *Chaunt* test as requiring the government to prove that the concealed facts prevented an investigation that would (not might) have warranted denial of citizenship.

The Fifth Circuit reversed.⁷⁴ Following *Kassab* and *Vasquez-Mondragon*, the court held that the second *Chaunt* test required only that (1) disclosure of the true facts would have led to an investigation and (2) the investigation might have uncovered other facts warranting denial of citizenship. The court found the government had met this test.

Instead of resolving this conflict, the Supreme Court affirmed on a different basis: the first *Chaunt* test.⁷⁵ On the evidence, the Court held that disclosure of the true facts would have made Fedorenko ineligible for a visa under the Displaced Persons Act. It rejected the contention that involuntary service would have been exempted from the statutory language making ineligible all who "assisted the enemy in persecuting civilians." The Court questioned but declined to decide whether the *Chaunt* test for materiality of misrepresentations in naturalization proceedings also applies to false statements in visa applications.⁷⁶ On the authority of *La Madrid-Peraza*, as well as *In re S- and B- C-*, it should have concluded that it does.

As one commentator has stated, "[t]he Supreme Court's failure to resolve the ambiguity in its *Chaunt* standard for determining materiality is disappointing."⁷⁷ The question remains whether the investigation must uncover facts to sustain a finding of materiality which would have warranted a denial, or only might have warranted a denial.

III. Conclusion

This examination of the law of fraud in immigration matters serves only to introduce the subject. It should, however, show that those who use the term "fraud" indiscriminately are unaware of both legal history and present legal realities. A careful study of the subject is required of anyone who would accuse another of this "most odious"⁷⁸ of offenses.

73 *United States v. Fedorenko*, 455 F. Supp. 893 (S.D. Fla. 1978).

74 *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979).

75 101 S. Ct. 737 (1981).

76 The Court stated in a footnote: "Our decision makes it unnecessary to resolve the question whether the Court of Appeals correctly interpreted the materiality test enunciated in *Chaunt*." *Id.* at 753 n.40.

77 M. Roberts, *supra* note 64, at 41.

78 "Fraus idiosa atque non praesumanda," an old equity maxim.